OPINIONS BELOW

The memorandum opinion of the court of appeals, *United States v. Sanders*, 146 Fed.Appx. 188, 2005 WL 2573430 (9th Cir. 10/13/2005), is not reported and is reprinted at Pet. App. [Petitioner's Appendix] 1a-2a. The order denying petitions for panel rehearing and rehearing *en banc* is reprinted at Pet. App. 3a. The findings and recommendations of the district court magistrate judge are reprinted at Pet. App. 4a-29a, and the order by the district judge adopting the magistrate judge's findings and recommendations is reprinted at Pet. App. 30a-31a. The district judge's order issuing a certificate of appealability is reprinted at Pet. App. 32a-33a.

JURISDICTION

The court of appeals entered its judgment in this case on October 13, 2005. Petitions for panel rehearing and rehearing *en banc* were filed on October 24, 2005. The petitions for panel rehearing and rehearing *en banc* were denied on December 2, 2005. The petition for writ of certiorari was timely filed on February 24, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of Title 28, Chapter 153 of the United States Code: Habeas Corpus; 28 U.S.C. §§ 2253 ("Appeal") and 2255 ("Federal custody; remedies on motion attacking sentence").

STATEMENT OF THE CASE

Petitioner was indicted and convicted of perjury for telling a federal grand jury, years after a fire heavily damaged his rented house and destroyed virtually all of his personal property, that items he abandoned in the house were damaged to the extent that they were no longer usable. The grand jury

was convened by the prosecutor, an Assistant United States Attorney who was pursuing an ongoing prosecution of petitioner's brother. A finding by the grand jury that there was little or no damage from the fire would have supported further charges against his brother, but petitioner would not "play ball": despite a threat of prosecution for perjury, petitioner refused to "change his story" and tell the grand jury that there was no damage from the fire.[1]

A. Factual Background

On July 8, 1993, petitioner's home in Portland, Oregon was heavily damaged by a fire that resulted from the accidental ignition of cooking oil on a kitchen stove. The three-bedroom house was rented by Shippers Dispatch, an Oregon corporation administered by petitioner's brother James Sanders.[2]

In his official fire report, a Portland Bureau of Fire Lieutenant supervising the fire crew that responded to the fire verified the cause of the fire and indicated -- by definition -- a total loss of contents: he entered $15,000 as the estimated "value" of contents before the fire and $15,000 as the "loss" of contents. Petitioner had no renter's insurance. After a representative of the American Red Cross visited the house

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[1] An individual who testified before a previous grand jury convened by the same prosecutor in the investigation of petitioner's brother told petitioner that she did give the grand jury the prosecutor's desired incorrect version of the facts to avoid a similar threat of prosecution.

[2] Petitioner was not a principal in, nor did he have any direct connection with Shippers Dispatch. Petitioner had completed 28 years in the Air Force in 1991 and attended graduate school in residence at the University of Idaho from 1991 until January 1993, when he moved to Portland to finish his master's thesis in May 1993. Petitioner, a computer engineer by education, experience, and training, had helped install and program computer equipment in his brother's office since 1986.

and verified the loss, petitioner was provided emergency housing and vouchers for replacement clothing and other personal items.

The prosecutor was investigating petitioner's brother in connection with Shippers Dispatch activities and, in 1994, indicted him for various counts of mail fraud.[3] Because of statements made by petitioner's brother to the prosecutor in a response to a subpoena *duces tecum* that Shippers Dispatch documents listed in the subpoena might have been in the house at the time of the fire, the prosecutor saw that he could justify additional charges against petitioner's brother if he could prove that there was no damage to any of the contents. The prosecutor later articulated this reasoning at a 1997 motions hearing: "If the Government can establish that nothing at all burned -- well, then, *ipso facto*, James Sanders has to be lying."

The prosecutor subpoenaed petitioner to testify before a federal grand jury on March 8, 1996. Under examination by the prosecutor, petitioner at one point stated that personal property he had abandoned in the house were "not recognizable, burnt." This went against the prosecutor's desire to "establish that nothing at all burned," and contradicted a statement attributed in an FBI investigation report to the Fire Bureau Lieutenant by the FBI Case Agent that "there was no clothing or personal effects destroyed."[4] a claim that is bizarre in light of the total loss to contents indicated on his official fire report.

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[3] Petitioner's brother was tried in May 1996 and convicted on several counts. *USA v. Sanders, et al*, 94-CR-328-LKK, U.S. District Court for the Eastern District of California.

[4] FBI 302, telephonic interview of Lt. Joseph M. Ligatich by SA Todd Davis, November 1, 1995.

After the grand jury proceeding, the prosecutor told petitioner (through his attorney) that he had a "sworn statement by [the Fire Bureau Lieutenant]" and that petitioner would be indicted for perjury if he did not go back into the jury room and "change his story" by presumably telling the grand jury that he did not really lose anything in the fire. Petitioner -- who had lost virtually all of his clothing, furniture and appliances, military awards and certificates, and other personal property in the fire -- maintained the truth. The grand jury returned a single count indictment for perjury under 18 U.S.C. § 1623 based on petitioner's statement that personal items he abandoned in the middle bedroom of the house were "not recognizable, burnt."[5]

B. Proceedings Below

Petitioner's trial began on January 7, 1997. The prosecutor first attempted to establish that "nothing at all burned" -- thus destroying petitioner's credibility -- through the testimony of the Fire Bureau Lieutenant, his chief witness. This new testimony conflicted with the Lieutenant's testimony in a previous trial.[6] When this failed, however,

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[5] Although not specified in the indictment, the middle bedroom was later confirmed as the area that was the subject of the perjury indictment in the findings of the Department of Justice Office of Professional Responsibility: "He also testified that there were boxes of documents in a middle bedroom that were damaged, specifically, 'not recognizable, burnt.' The latter statement was the basis of a subsequent perjury charge based on evidence that no documents in the bedroom had been destroyed during the fire." (Pet. App. 18a, 35a.)

[6] This discrepancy in testimony was noted in the findings of an investigation by the Department of Justice Office of Professional Responsibility, OPR, describing the Fire Lieutenant's testimony, wrote: "The expert's testimony regarding the damage to the middle bedroom was not entirely consistent at the two trials." (Pet. App. 37a.) The prosecutor first produced the Fire Bureau Lieutenant to testify about the fire at

and with no credible evidence against petitioner, he resorted to destroying petitioner's credibility by deception in his closing argument: he mischaracterized statements made by petitioner in his trial testimony as lies, to convince the jury: "It's about lying in the grand jury, and you know that he did that because you know he lied to you."[7] (Pet. App. 9a.)

The jury returned a verdict of guilty on January 8, 1997. On January 15, 1997, petitioner filed a motion for Judgment of Acquittal and/or Arrest of Judgment, and on March 17, 1997, he filed a motion for new trial. Both motions were denied April 11, 1997.

On May 2, 1997, petitioner was sentenced to 5 months incarceration, 5 months home confinement, 36 months

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petitioner's brother's 1996 trial. When the Lieutenant was questioned there about the identical "value" and "loss" numbers on his official fire report, he gave the explanation that they represented the "used" and "new" values and the fact that they were equal was purely a coincidence. When shown photographs that were taken three days after the fire by an independent fire investigator, including one that showed extensive fire and smoke damage to the middle bedroom, he acknowledged that the photograph of the middle bedroom showed "fire damage," "scorching," and "smoke damage," but he denied it was the same house. Under cross-examination, he finally admitted that it was the same house. (The subject of the fire was dropped and not used in closing arguments.) At petitioner's trial, he justified the damage by presenting the theory that the photograph was somehow "staged," but this theory was killed by the fire investigator who authenticated his own photograph. When asked at petitioner's trial if it could have been staged, the fire investigator replied "absolutely not."

[7] This tactic -- the "big fat dirty filthy stinking rotten lie" -- is a recognized favorite of prosecutors because it makes it easier to convince a jury of guilt. The prosecutor can simply tell the jury, "The defendant lied to you, just like he lied previously." "The Art of The Referral: Presenting Cases to United States Attorneys," The Journal of Public Inquiry, Summer 1997.

probation, and a $5,000 fine. Petitioner's subsequent direct appeal was denied on February 27, 1998, and the Supreme Court denied certiorari on June 22, 1998. *United States v. Sanders*, 141 F.3d 1182 (9th Cir 1998), *cert. denied* 524 U.S. 939, 118 S.Ct. 2346, 141 L Ed 2d 716 (1998). Petitioner served 5 months imprisonment from March 5, 1999, to August 3, 1999. While incarcerated, petitioner filed a motion for relief pursuant to 28 U.S.C. § 2255. A Magistrate Judge issued his Findings and Recommendations on October 31, 2003, recommending that petitioner's § 2255 Motion be denied. (Pet. App. 4a). On January 14, 2004, the District Judge adopted the Magistrate Judge's Findings and Recommendations "in full." (Pet. App. 30a.) On motion by petitioner, the District Judge issued a certificate of appealability on February 18, 2004:

> Movant has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant motion: whether the prosecutor committed (Pet. App. 4a.) misconduct during closing argument by mischaracterizing movant's testimony and presenting false and misleading arguments to the jury.

(Pet. App. 33a.)

C. Office of Professional Responsibility Investigation

After the trial, the prosecutor contacted the U.S. Probation Office and advocated a sentencing enhancement for obstruction of justice, based on his allegation that petitioner had testified falsely about the attic. The probation officer accepted the prosecutor's word at face value:

> Though I have not had the opportunity to review the trial transcript, you advised that the defendant lied at the trial, providing false information to the court. The defendant testified that materials located in the attic were burned...

(Letter, Kris M. Miura, USPO, to AUSA Daniel S. Linhardt. April 11, 1997.)

At the Judgment and Sentencing hearing on May 2, 1997, when challenged by petitioner's counsel,[8] the prosecutor admitted on the record -- after reviewing the trial record – that he was "wrong":

> I think the only objection -- I think probably [defense counsel] made it; we agree that he's right -- would be on the issue of the enhancement for obstruction for false statements during the trial, where I think we told the Court that the probation officer made her recommendation based on my recollection of what happened. And after I reviewed the record, I was wrong.

(Reporter's Transcript, Judgment and Sentencing, 5/2/97)

After this admission, petitioner filed a complaint for misconduct against the prosecutor with the Department of Justice's Office of Professional Responsibility who, prompted by media attention,[9] conducted an investigation. The Office of Professional Responsibility responded to petitioner with a letter acknowledging that the prosecutor did misrepresent petitioner's testimony to the jury, but the prosecutor's misrepresentations were simply mistakes:[10]

> We initiated an inquiry into your allegations. We found that Mr. Linhardt misstated your testimony during summation and after your trial when he advocated that you should receive a sentencing enhancement for obstruction of justice based on your testimony.

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[8] New appellate counsel replacing trial counsel.

[9] Part 7, "Win at all costs," a series in the Pittsburgh Post-Gazette, December 6, 1998 (Pet. App. 50a.)

[10] Also described by OPR as "careless mistakes." (Pet App. 44a.)

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> However, we determined that these actions were mistakes rather than intentional conduct...

(Pet App. 47a.).

The mostly conclusory findings of the investigation (generally favoring the Department) are reprinted at Pet. App. 34a, and a letter notifying the United States Attorney responsible for this case of the findings is reprinted at Pet. App. 45a.[11]

SUMMARY OF ARGUMENT

Petitioner's claims of prosecutorial misconduct are based upon evidence of a course of conduct deliberately pursued by the Assistant United States Attorney with the aim of hiding weaknesses in the prosecution's case by falsifying some facts and suppressing others to produce a deceptive and grossly inaccurate picture of petitioner's credibility. These are flagrant violations of Due Process that a federal court is obliged to rectify in habeas corpus proceedings.

During closing argument, the prosecutor repeatedly characterized petitioner as a "liar" while placing his personal assurances of veracity behind the credibility of the government's witnesses. There was no evidence against petitioner in this credibility contest except the testimony of the Fire Bureau Lieutenant, whose questionable credibility was impermissibly bolstered by the prosecutor's misconduct.

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[11] Both were obtained by stipulated settlement of an action under the Freedom of Information Act. Civil Action No. 00-1393 (GK), United States District Court for the District of Columbia, November 21, 2000. Portions of the text have been redacted, and are supplied where the redacted text is obvious from the context.

Defense counsel failed to object to the many instances of improper comments by the prosecutor. Although this compounded the prejudicial effect of the misconduct, the Ninth Circuit refused to hear petitioner's claim of ineffective assistance of counsel despite the fact that "but for" defense counsel's unprofessional failure to object at all during the prosecutor's improper closing argument, the outcome of the case would have been different.

The appeals court further concluded that the prosecutor's misrepresentations were excused because "at the start of trial and immediately after closing arguments, the district court admonished the jury not to consider the attorneys' statements and arguments as evidence." Clear precedent in virtually all circuits dictates that the standard instruction is an adequate cure to a prosecutor's questionable statements only in cases where there is overwhelming evidence against the defendant -- not a credibility contest, as here -- or if the statements were invited by comments of the defense counsel.

ARGUMENT

I. THE NINTH CIRCUIT DEPARTED FROM THIS COURT'S AND VIRTUALLY EVERY CIRCUIT'S PRECEDENT IN RULING THAT A PROSECUTOR'S FALSE STATEMENTS DURING CLOSING ARGUMENT THAT ATTACKED THE DEFENDANT'S CREDIBILITY IN A PURE CREDIBILITY CONTEST WERE A REASONABLE INFERENCE BASED ON THE EVIDENCE AND NOT A DENIAL OF DUE PROCESS EVEN THOUGH THERE IS AN ADMITTED DISTINCT POSSIBILITY THAT THE JURY BASED THEIR VERDICT ON THOSE ADMITTEDLY AND PROVEN FALSE STATEMENTS.

A. Precedent in virtually all circuits, based on Supreme Court precedent, holds that misstatement of material facts to the jury by the prosecutor violates Due Process and warrants habeas relief.

The Due Process clause of the Fourteenth Amendment forbids the government from knowingly using, or failing to correct, false testimony. *United States v. Gonzales*, ___ F.3d ___, 2006 WL 118276 (5th Cir. 04-20131 1/17/2006), citing *Giglio v. United States*, 405 U.S. 150, 153 (1972). To prove a Due Process violation, the defendant must establish (1) that there was false testimony, (2) that the government knew the testimony was false, (3) that the testimony was material. *Gonzales*, citing *United States v. Mason*, 293 F.3d 826, 828 (5th Cir.2002). This rule also applies to false statements made during the prosecutor's rebuttal closing. *Gonzales*, citing *United States v. Williams*, 343 F.3d 423, 439 (5th Cir.2003).

Ninth and other circuits have held similarly. *See e.g., Angulo v. Bunnell*, 952 F.2d 406 (9th Cir. 1991) (citing *Darden v. Wainwright*, 477 U.S. 168, 182 (1986)) (prosecutorial misconduct may be grounds for habeas relief when it "manipulate[s] or misstate[s] the evidence"); *United States v. Kojayan*, 8 F.3d 1315, 1321 (9th Cir. 1993) (the difference between a lawyer "asking the jury to infer only things that he believed in good faith might be true" and making "factual assertions he well knew were untrue" is "the difference between fair advocacy and misconduct"); *United States v. Rodrigues*, 159 F.3d 439, 451 (9th Cir. 1998) (Combination of misstatement of the law by the prosecutor with slander of defense counsel was prejudicial to the point of denying defendant a fair trial); *United States v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) ("it is improper to imply reliance on a fact that the prosecutor knows to be untrue"); *United States v. Valentine*, 820 F.2d

565, 566 (2nd Cir. 1987) (finding prejudicial misconduct where the prosecutor misrepresented, at least implicitly, the substance of the testimony of several Grand Jury witnesses); *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994); *cf.* A.B.A., Standards for Criminal Justice Prosecution Function and Defense Function 3-5.8(a) (3d ed. 1993) ("The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.").

Here, the statements by the prosecutor to the jury in closing rebuttal meet the requirements of Fifth Circuit's standard for knowing use of false testimony identified above. The fact that the statements were false, and thus constitute false testimony, is evidenced by the Office of Professional Responsibility's acknowledgement, after their review of the record, that the prosecutor did, in fact, misrepresent petitioner's testimony to the jury.

The Fifth Circuit's third requirement above is also met. The false statements by the prosecutor were material. Since petitioner's credibility was the sole issue,[12] the government had to make it appear that he was not a credible witness. Failing to impeach petitioner's credibility during questioning, the prosecutor resorted to misstating his testimony to argue to the jury in closing that that petitioner had lied to them about records in the attic being destroyed by the fire. The jury was continually "reminded" of the fact that petitioner had lied to them during his testimony when in fact he had not. In a close case such as this, where the credibility of the defendant is of critical importance, the improper and unsupported argument to the jury that petitioner had lied to them, and therefore had

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[12] "Now we have a credibility fight. And I'm not going to try to soft-pedal it to you. That's exactly what you have." Reporter's transcript, Closing Arguments by Daniel S. Linhardt, January 8, 1997

lied to the grand jury, unfairly tipped the balance against the defense.

As further evidence of the materiality, the prosecutor stated in a post-trial response that "there is the distinct possibility" that the jury based their guilty verdict solely on this now admittedly false "example of the defendant's dishonesty" that "could clearly have been great enough for the jury to have believed that he was also dishonest before the Grand Jury."[13]

Finally, the second requirement of the Fifth Circuit standard is satisfied: the government knew the testimony was false -- evidenced by his admission at the sentencing hearing.

B. The misconduct constitutes a fraud on the court.

The Sixth Circuit Court of Appeals addressed the concept of a fraud on the court in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993) ("Ivan the Terrible"). There, on its own motion, the Court vacated the judgment of the district court denying the petitioner's writ of habeas corpus upon finding that the judgments in underlying proceedings were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court. *Id.* at 356. The Sixth Circuit defined fraud upon the court as fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. *Id.*[14].

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[13] Government's Opposition to Defendant's Motion for Judgment of Acquittal and a New Trial, March 26, 1997.

[14] Ninth Circuit has similarly defined a fraud on the court as "...a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases

The Sixth Circuit further delineated the elements that constitute a fraud on the court: (1) conduct by an officer of the court; (2) directed towards the judicial machinery itself; that is (3) intentionally false, willfully blind to the truth or is in reckless disregard for the truth; is (4) a positive averment or concealment when one is under a duty to disclose; and that (5) deceives the court. *Id.* at 348.

Here, the first two elements are easily satisfied. The prosecutor is clearly an "officer of the court." *See, e.g., Colvin v. Taylor*, 324 F.3d 583, 586 (8th Cir. 2003) ("As an officer of the court, the prosecutor had the duty to convey to the court facts about the case and the defendant..."). In a habeas proceeding, actions of an attorney are "clearly directed at the judicial machinery of the court." *Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004) (Suhrheinrich, Circuit Judge, concurring in part and dissenting in part).

The third and fourth elements are also satisfied. The prosecutor made the intentional false assertion to the jury that there was no fire damage to the middle bedroom, the subject of the indictment, knowing that the fire report showed a total loss to all contents. He made the allegation, in reckless disregard for the truth, that petitioner committed perjury in his trial testimony. He later intentionally concealed, in spite of a duty to disclose, the fact that he later improved his "recollection of the record" and realized his allegations of perjury against petitioner were false. Still later, after the Office of Professional Responsibility found and advised his office that his statements misrepresented petitioner's testimony, he returned to his original falsehoods.

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that are presented for adjudication." *Keys v. Dunbar*, 405 F.2d 955 (9th Cir. 1969); *Luttrell v. United States*, 644 F.2d 1274 (9th Cir. 1980).

As for the fifth element, there can be little doubt that the court was deceived. The prosecutor even boasted in a post-trial response that the guilty verdict was the probable result of his deceptive statements that he later recanted:

> The prosecutor argued strenuously in both his initial and closing argument that the defendant was not to be believed.
>
> ***
>
> The testimony of the defendant Thomas Sanders and his girlfriend was in direct contradiction with that of two experts regarding whether there were boxes of material in the attic which burned.[15] The jury thus had before it an example where the defendant had lied to the jury during the course of the trial. This example of the defendant's dishonesty could clearly have been great enough for the jury to have believed that he was also dishonest before the grand jury. The jury could have discounted all of his testimony and accepted the testimony of Lieutenant Ligatich who is the only individual, other than the

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[15] Although the prosecutor admitted he was "wrong," and the Office of Professional Responsibility acknowledged that the prosecutor did misrepresent petitioner's testimony to the jury and to the probation officer (Pet App. 47a.), the prosecutor made no effort to correct the damage that was done by the false impression left with the jury. Instead, the prosecutor began to play "fast and loose" with the courts in his opposition to petitioner's § 2255 Motion: the prosecutor returned to the position : "...the prosecutor was correct when he said in closing argument that the defendant and his girlfriend, Genevieve Rich, had both stated material was in the attic at the time of the fire and that it was destroyed." (Government's Response to Defendant's 2255 Motion, October 1, 1999.) Thus, he had argued one position "strenuously" to win a conviction and the post-trial motions, and then quickly abandoned it when he was proven wrong. But years later, when it was again advantageous to use the previously discredited position, he revisited it.

defendant, on the scene of the fire. There is the distinct possibility that this is exactly what occurred since the jury only took about an hour and a half to reach its verdict.

Government's Opposition To Defendant's Motion For Judgment Of Acquittal And A New Trial, March 26, 1997.

II. THE NINTH CIRCUIT DEPARTED FROM ITS OWN PRECEDENT FOR NOT FINDING REVERSIBLE ERROR WHERE, IN A PURE CREDIBILITY CONTEST, HE REPEATEDLY PLACED HIS PERSONAL ASSURANCES OF VERACITY BEHIND THE CREDIBILITY OF THE GOVERNMENT WITNESSES IMPLYING THAT IF THE GOVERNMENT'S WITNESSES DIDN'T LIE, THE JURY MUST CONCLUDE THAT THE DEFENDANT LIED.

A. Ninth Circuit precedent has held that it is improper vouching for the prosecutor to say that a government witness had "no reason to lie."

"[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18-19 (1985); *Berger v. United States*, 295 U.S. 78, 88-89 (1935).

The Ninth Circuit, following this reasoning in *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), concluded that since a dispute in the evidence as to the credibility of a witness is a matter that by definition is for the jury to resolve, statements by a prosecutor on his own view that witnesses are credible or not credible, or indeed to say flat out that a witness "told the truth" (or "had no reason to lie") rather than to invite the jury to make all of those determinations based on evidence to which the prosecutor points, cannot fairly be labeled as a "comment based upon

the evidence." Rather, it could be interpreted by the jury as "implication of official governmental support." *Weatherspoon*, 410 F.3d at 1148.

> [P]rosecutorial statements that vouch for the credibility of witnesses and that encourage the jury to act based on considerations other than the particularized facts of the case pose a real danger to the defendant's right to a fair trial. Because that danger was not effectively mitigated by curative instructions from the district judge, we conclude that the prosecutorial misconduct here "affected the jury's ability to consider the totality of the evidence fairly."

Weatherspoon, 410 F.3d at 1152 (quoting *United States v. Smith*, 962 F.2d 923, 935 (9th Cir. 1992)).

A prosecutorial statement may be considered impermissible vouching if it "place[s] the prestige of the government behind the witness" by providing "personal assurances of a witness's veracity." *Weatherspoon*, 410 F.3d at 1147 (quoting *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980).

Ninth Circuit characterized *Weatherspoon*, as petitioner's case, to be a credibility contest: "a comparatively close case that boiled down to a battle over credibility." *Weatherspoon*, 410 F.3d at 1152. In *Weatherspoon* and petitioner's case, the testimony of the government witnesses was the only evidence of defendant's guilt.

In *Weatherspoon* and petitioner's case, the prosecutor improperly vouched for government witnesses in an effort to outweigh the defendant's credibility. In *Weatherspoon*, the prosecutor told the jury that the government witnesses were "credible police officer[s]" who "had no reason to lie in this case or not tell the truth." *Id.* at 1146 [emphasis added]. The

prosecutor "clearly urged that the existence of legal and professional repercussions served to ensure the credibility of the officers' testimony." *Id.* The court noted that in each instance of improper vouching, the pattern of the prosecutor's message was identical:

> I believe [do not believe] the testimony of Witness A. Therefore you should believe [not believe] Witness A too [either]. It is of course the implicit "therefore" contained in that message that is improper.

Id. at 1148.

Here, the prosecutor followed the same pattern. First, he set up the dichotomy:

> Two people lied up there. Either the people are the defendant, Thomas Sanders, and Genevieve Rich, his girlfriend; or Lieutenant Ligatich and the defendant's expert, Jim Hart.

(Closing Arguments by Daniel S. Linhardt, Pet. App. 7a.).

Then he instructed the jury to believe the government witnesses because they had no reason to lie:

> And look at Lieutenant Ligatich. Motive to lie? He's a fire lieutenant for the Portland Fire Bureau, doesn't work for the federal government, even. He has no reason to lie. Why's he going to lie?
>
> ***
>
> ...and that Larry Danielson lied to you. And there's no reason for these guys to lie. [Emphasis added]

(Closing Arguments by Daniel S. Linhardt, Pet. App. 9a-11a.).

In his final rebuttal, the prosecutor injected his personal belief that petitioner was on the side of the dichotomy that lied:

> Told you about the documents upstairs in the attic, and now it is the case of Mr. Hart and Mr. Ligatich against Sanders and Ms. Rich. And this is an important thing. And telling you the truth is an important thing. And it is something to be excited about and get upset about when you think it doesn't happen, because the system requires it. And yes, I can get darned upset about that.

B. Ninth Circuit precedent has held that it is improper for the prosecutor to argue that if the government's witnesses didn't lie, the jury must conclude that the defendant lied.

The Ninth Circuit opinion in *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999) deals with exactly this argument. In a section styled "Prosecutorial Misconduct During Closing Argument," the Ninth Circuit reviewed a prosecutor's closing argument and found that "the prosecutor committed misconduct in vouching for his witnesses, denigrating the defense as a sham, and arguing that it was the jury's duty to find the defendants guilty."[16] *Id.* at 1225.

After noting many outrageous arguments of the prosecutor, Ninth Circuit reversed the tainted verdict, specifically holding:

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[16] In *Sanchez*, the prosecutor claimed that it was the jury's duty to find the defendants guilty. He argued: "...you as jurors do your duty and well consider this matter and find these defendants guilty. *Sanchez*, 176 F.3d at 1224. The Court held that: "It is also improper for the prosecutor to state that the duty of the jury is to find the defendant guilty." *Sanchez*, 176 F.3d at 1224, 1225 (Citing *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (improper for prosecutor to tell jury it had any obligation other than weighing evidence)). Here, the prosecutor closed his final rebuttal by sanctimoniously reminding the jury that to preserve the integrity of the justice system, they must find the defendant guilty: "And based on...the integrity of the system, the judicial system as we know it, you must find the defendant guilty.

> [P]rosecutors have been admonished time and again to avoid statements to the effect that, if the defendant is innocent, government agents must be lying.

Id. at 1224 (Quoting *United States v. Richter*, 826 F.2d 206, 209 (2nd Cir. 1987)).

Here, the prosecutor committed every infraction condemned by Ninth Circuit in *Sanchez*. In his closing argument, the prosecutor told the jury that if the defendant is innocent, the government witness must be lying:

> ...it's a credibility question. If you people decide that Lieutenant Ligatich and Mr. Hart, the defense witness, and Larry Danielson lied to you, if that's what you think, then as a prosecutor I am telling you, acquit that man.

(Closing Arguments by Daniel S. Linhardt, Pet. App. 10a.).

The *Sanchez* court further held that:

> It is improper vouching for the prosecutor to offer personal assurances of the veracity of government witnesses or to suggest that their testimony is supported by information not introduced as evidence.

Sanchez, 176 F.3d at 1224 (Quoting *United States v. Molina*, 934 F.2d 1440, 1445 (9th Cir. 1991)).

Here, the prosecutor improperly vouched for the credibility of the Fire Bureau Lieutenant:

> And look at Lieutenant Ligatich. Motive to lie? He's a fire lieutenant for the Portland Fire Bureau, doesn't work for the federal government, even. He has no reason to lie. Why's he going to lie?

(Closing Arguments by Daniel S. Linhardt, Pet. App. 9a.).

C. Ninth Circuit precedent has held that improper vouching standing alone would require reversal where witness credibility was the issue.

In *United States V. Combs*, 379 F.3d 564 (9th Cir. 2004), where, as here, "witness credibility was paramount" ("the case boiled down to whether the jury believed Combs" or the government witnesses. *Id.* at 573), the Ninth Circuit found that it is prosecutorial misconduct for a prosecutor to force defendant to call testifying government agent a liar (*Id.* at 572), and later vouch for that witness. Either action is error.

In Combs, the prosecutor forced the defendant to say that one of the government witnesses was a liar:

> Q: [Prosecutor] That wasn't my question. My question was are you saying that Special Agent Bailey was lying when he testified earlier?
> A: [Defendant] I am saying what is written on that paper is not what I said.

Combs, 379 F.3d at 567.

The court held that the prosecutor's statements in closing argument regarding the officers' lack of motivation to lie constituted improper vouching. *See Id.* at 574-76 (the prosecutor's argument about the Special Agent's "disincentive to lie" was impermissible vouching):

> The defendant claims Special Agent Bailey is lying. Ask yourselves, ladies and gentlemen, who has the motive to lie here, the defendant or Special Agent Bailey...or the defendant who is facing two felony charges?

Id.

Here, as in *Combs*, the prosecutor attempted to force the defendant to say that one of the government witnesses was a liar:

> Q. [Prosecutor] So [Special Agent Larry] Danielson got up there and lied; is that what you're saying?
> A. [Defendant] No, I'm not saying he lied.

And later vouched for his witnesses in closing:

> ...that Lieutenant Ligatich lied to you; and that Larry Danielson lied to you. And there's no reason for these guys to lie.

(Closing Arguments by Daniel S. Linhardt, Pet. App. 11a.)

Ninth Court precedent has held improper vouching to be plain error:[17]

> [W]e find that the repeated instances of prosecutorial vouching affected the jury's verdict....We reverse for plain error."

United States v. Kerr, 981 F.2d 1050, 1054 (9th Cir. 1992).

Plain error is "(1) error; (2) that was plain; and (3) affected substantial rights." (*United States v. Benitez-Perez*, 367 F.3d 1200, 1205 (9th Cir. 2004) (citing *United States v Olano*, 507 U.S. 725, 734 (1993))). "If the error satisfies these criteria, we are still not required to reverse unless the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Benitez-Perez*, 367 F.3d at 1205. (quoting *United States v. Alli*, 344 F.3d 1002, 1007 (9th Cir. 2003)). Improper vouching alone rises to this level:

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[17] The Tenth Circuit also ruled that this constitutes plain error: "...more "starkly offensive" conduct by the prosecutor, such as calling a rebuttal witness to emphasize the cross-examination of the defendant or stating during closing argument that a verdict for the defendant would require a finding that all of the government's witnesses were lying, would be required to constitute plain error." *United States v. Williamson*, 53 F.3d 1500, 1523 (10th Cir. 1995).

> Either the improper questioning...or the improper vouching standing alone would require reversal in this close case. Viewed in the context of the entire trial, each of these errors prejudiced Combs' "substantial rights" and "seriously affected the fairness, integrity, or public reputation of" his trial.

Combs, 379 F.3d at 576 (quoting *United States v. Geston*, 299 F.3d 1130, 1135 (9th Cir. 2002)).

III. THE NINTH CIRCUIT DEPARTED FROM OTHER CIRCUITS' PRECEDENT WHEN, IN A PURE CREDIBILITY CONTEST, IT REFUSED TO CONSIDER AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S IMPROPER VOUCHING FOR THE VERACITY OF GOVERNMENT WITNESSES AND MISREPRESENTATIONS OF TESTIMONY IN AN EFFORT TO DESTROY THE DEFENDANT'S CREDIBILITY.

A. Other circuits have held that the cumulative effect of prosecutorial misconduct and ineffective assistance of counsel is grounds for habeas relief.

In a case from the Sixth Circuit, defense counsel's performance was found to be deficient for failing to object during closing argument to the prosecutor's improper emphasis on evidence of defendant's bad character, where there was no evidence in the record to support his assertions. In *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000), the prosecutor improperly boosted the victim's credibility by diminishing that of defendant, very likely tipping the scales in victim's favor and against the defendant. *Id.* at 708. *Hofbauer* was also a credibility contest. *Id.* at 707. The *Hofbauer* Court summarized defense counsel's performance:

> The prosecution's tactics and challenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction, yet [defense counsel] sat silent. At the most pivotal moments, we conclude, his silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy.[18]

Id. at 703.

Here, the prosecutor improperly boosted the credibility of the chief government witness while improperly accusing petitioner of lying during his grand jury and trial testimony. The court of appeals found the deficiency to be prejudicial and provided a basis for post-conviction relief, and reversed the conviction.

The Tenth Circuit decided a case where, as here, the evidence against the defendant was weak and the outcome was totally dependent on credibility. The prosecution "impermissibly bolstered and vouched for critical state witnesses," and the Court had "no difficulty in concluding that habeas relief is warranted on the basis of cumulative

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[18] A reasonable tactical basis for failing to make an objection to the prosecution's closing argument may be within the wide range of permissible professional legal conduct. See *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993). Petitioner here has repeatedly requested an evidentiary hearing. Without the benefit of an evidentiary hearing, the court cannot usually determine if counsel's decision was a strategic one, and if so, whether the decision was a sufficiently informed one. *See Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992). When evaluating a claim of ineffective assistance in a § 2255 motion, the district court should hold an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *United States v. Chacon-Palomares*, 208 F.3d 1157, 1160 (9th Cir. 2000).

error." *Cargle v. Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2003):

> We conclude that prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment.

Id. at 1200.

Other circuits have similarly ruled that failure to object to improper comments during closing arguments constitutes ineffective assistance of counsel: *Burns v. Gammon*, 260 F.3d 892, 897-898 (8th Cir. 2001) (Defense counsel's failure to object to prosecutor's comment during closing argument was ineffective assistance of counsel that prejudiced petitioner, and was sufficient cause to warrant habeas relief. There was no tactical advantage to be gained by not objecting to the comments.); *Copeland v. Washington*, 232 F.3d 969, 975 (8th Cir. 2000) (In sentencing phase closing argument, the prosecutor referred to facts not in evidence. The Court concluded that the prosecutor's closing argument was improper, and the failure to object to the argument constituted ineffective assistance of counsel. Improper argument would have had a significant prejudicial effect on the jurors, and it was unreasonable to conclude that the argument did not result in a deprivation of Due Process.); *Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996) (holding that defense counsel's failure to object to very serious prosecutorial misconduct amounted to ineffective assistance of counsel); *Humphries v. Ozmint*, 366 87 F.3d 266 (4th Cir. 2004) (failure of defense counsel to object to improper

arguments fell below the *Strickland* objective standard of reasonableness and was constitutionally deficient).

Here, the cumulative impact from the harm in allowing the prosecutor to misrepresent to the jury that petitioner had testified falsely at trial and to argue that the jury had a duty to convict clearly "undermines any confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

B. Habeas relief was warranted in another circuit where the prosecutor argued facts not in evidence and the defense attorney failed to object to the prosecutor's improper closing argument.

The Sixth Circuit of *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005), directly on point here, held that (1) the prosecutor engaged in misconduct in commenting on credibility of witnesses; (2) the prosecutor engaged in misconduct by placing improper emphasis on defendant's alleged bad character with an argument based on facts not in evidence; and (3) habeas relief was warranted because failure of petitioner's attorney to object to prosecutor's closing argument was objectively unreasonable and prejudiced the defendant, and, thus, constituted ineffective assistance. The Court of Appeals granted a certificate of appealability on all issues raised in the petition.

1. Improper Comments on Witness Credibility

In *Hodge*, the prosecutor engaged in misconduct when, throughout closing argument, he repeatedly commented on the credibility of witnesses by stating, for example, that defendant was "lying to extricate himself from what he's done." *Hodge*, 426 F.3d at 379. Here, the prosecutor told the jury: "What motive does the defendant have to lie? Well, he's on trial, on trial for a felony..." (Pet. App. 5a.)

In *Hodge*, the prosecutor told the jury that government witnesses were "absolutely believable," suggesting that the jury should simply trust the government. The Court stated that it was improper to comment on witness credibility when that statement is coupled with a statement that the witness in question was "is basically telling the truth...because she had no reason to lie." *Id.* [Emphasis added]. Here, the prosecutor commented on the government's chief witness: "a fire lieutenant for the Portland Fire Bureau...He has no reason to lie." (Pet App. 9a.) "Lieutenant Ligatich has no reason to lie at all, no motive." (Pet App. 10a.)

2. Improper Argument Based on Facts Not In Evidence

In Hodge, the prosecutor's comments also extended to the credibility of defense witnesses. "Most troubling" was where the prosecutor completely misrepresented, in his closing arguments, a defense witness's testimony. *Hodge*, 426 F.3d at 380. Here, in his closing arguments, the prosecutor completely misrepresented petitioner's testimony in a concerted effort to destroy his credibility. His stated purpose was to present evidence of bad character to the jury: "you know that he [lied in the grand jury] because you know he lied to you." The prosecutor later admitted that petitioner did not lie in his testimony, and this was confirmed by the independent findings of the Office of Professional Responsibility.

3. Prejudice for Failure of Defense Attorney to Object

The Court in *Hodge* found that the prosecutor's statements were harmful to the defendant's case precisely because they are false, unsupported, or misleading, and that the bad-character arguments were sufficiently egregious to warrant, at a minimum, an objection at the bench following the conclusion of the prosecution's rebuttal argument. The Court was unable to articulate a sound professional reason

why defense counsel did not object to this pattern of repeated misconduct, and concluded that counsel's failure to object was "outside the wide range of professionally competent assistance." *Hodge*, 426 F.3d at 386. The Court found prejudice because the result of the trial depended primarily on the jury's determination of whether the defendant -- who, as here, took the stand in his own defense -- was more or less credible than the government's witnesses who testified against him. *Hodge*, 426 F.3d at 386-387.

Here, the comments by the prosecutor were at least as egregious, and defense counsel failed to object. Had counsel objected, the district court could have taken steps to limit any prejudicial impact of the improper statements by reminding the jury that if they thought the evidence was being mischaracterized by the prosecutor, they could disregard what the prosecutor said. *See, e.g., United States v. McClinton*, 135 F.3d 1178 (7th Cir. 1998).

Petitioner strongly argued that "but for" defense counsel's unprofessional failure to object to the prosecutor's improper closing argument, the results would have been different. His request to broaden the certificate of appealability to include the ineffective assistance claim was denied without explanation.

IV. THE NINTH CIRCUIT DEPARTED FROM PRECEDENT IN VIRTUALLY EVERY CIRCUIT WHEN IT HELD THAT, IN A PURE CREDIBILITY CONTEST, THE STANDARD INSTRUCTION TO THE JURY NOT TO CONSIDER THE ATTORNEYS' STATEMENTS AND ARGUMENTS AS EVIDENCE EXCUSED IMPROPER ATTACKS ON THE DEFENDANT'S CREDIBILITY.

A. The standard jury instruction that attorneys' statements and arguments are not evidence is inadequate to cure improper argument in a pure credibility contest.

In a case where the evidence against the defendant is not overwhelming, the misstatement goes to the key issue in the case (credibility), and there are no steps other than the standard jury instructions that the arguments of counsel are not evidence, the defendant is entitled to a new trial by reason of the error. *United States v. Watson*, 171 F.3d 695, 700-701 (DC Cir. 1999).

The previously cited case of *United States v. Weatherspoon*, 410 F.3d 1142 (9th Cir. 2005), was also characterized as a credibility contest: "a comparatively close case that boiled down to a battle over credibility." *Id.* at 1152. The court found that "the curative instructions offered here did not neutralize the harm of the improper statements because '[t]hey did not mention the specific statements of the prosecutor and were not given immediately after the damage was done.'" *Id.* at 1151. In another Ninth Circuit case previously cited, *United States V. Combs*, 379 F.3d 564 (9th Cir. 2004) -- also a credibility contest ("the case boiled down to whether the jury believed Combs" or the government witnesses. *Id.* at 573) -- this Court was not persuaded that the prejudice from the prosecutor's vouching was "neutralized" by the district court's general instructions to the jury because the instructions did not specifically address the improper vouching. *Id.* at 575. In the previously cited Sixth Circuit case *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005), where "the credibility of a witness' contested testimony was the key issue in the trial court..." (*Id.* at 387 (n.26)), the Court stated: "We are also unpersuaded that the trial court's generic jury instructions, which made no specific reference to the prosecution's misconduct, were sufficient to dispel any

prejudice from these statements." *Hodge*, 426 F.3d at 388 (n.27).

Here, the prosecutor has characterized the case as a credibility contest, where -- by definition -- evidence is weak at best:[19]

> Now we have a credibility fight. And I'm not going to try to soft-pedal it to you. That's exactly what you have.

(Closing Arguments by Daniel S. Linhardt.)

Only the general instructions were given to the jury that attorneys' statements and arguments are not evidence, found to be inadequate to cure the improper argument in *Watson*, *Weatherspoon*, *Combs*, and *Hodge v. Hurley*, which were also credibility contests where the evidence was not strong. Most circuits agree that the standard instruction is adequate only when the evidence against the defendant is strong[20] or were made in response to comments made by the defendant's counsel.[21]

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[19] *See, e.g., United States v. Cudlitz*, 72 F.3D 992 (1st Cir. 1996) (With no hard evidence against defendant, the case was a "credibility contest between [defendant] and four quite dubious witnesses...").

[20] *See, e.g., United States v. Thomas*, 377 F.3d 232 (2nd Cir. 2004) ("The judge also instructed at the end of the trial that statements made by the lawyers during the trial were not evidence." "The proof of guilt was strong in this case..."); *United States v. McWaine*, 243 F.3d 871, 243 F.3d 871 (5th Cir. 2001) ("The trial judge also carefully instructed the jury at least twice that a lawyer's statements are not evidence..." There was "overwhelming evidence presented against [defendant].")

[21] *See, e.g., United States v. Flake*, 746 F.2d 535, 539-541 (9th Cir.1984) (holding that the prosecutor did not impermissibly vouch for the credibility of witness where his comments were "clearly invited" by the defense's attack on the credibility of the government and its witnesses); *United States v. Insaulgarat*, 378 F.3d 456 (5th Cir. 2004)

B. Ninth Circuit's justification for accepting the standard jury instruction was in error.

Ninth Circuit relied on *United States v. Lopez-Alvarez*, 970 F.2d 583 (9th Cir. 1992) to dismiss the prosecutorial misconduct charge here arguing that the jury was instructed that "the lawyers' statements are not evidence," and this was sufficient to neutralize any prejudice. Pet. App. 2a. But the standard instruction made no specific reference to the prosecutor's misconduct,[22] and *Lopez-Alvarez* is distinguishable from this case because most of the comments challenged were made in response to comments made by the defendant's counsel: The jury was instructed that "the lawyers' statements are not evidence..." *Id.* at 598. "Most of the comments challenged by Lopez-Alvarez were made in response to comments made by the defendant's counsel." *Id.*

CONCLUSION

For the foregoing reasons and clear precedent, this petition for a writ of certiorari to the Supreme Court of the United States should be granted.

Respectfully submitted this 24th day of February, 2006.

Thomas M. Sanders, *in pro se*
Petitioner

("[T]he AUSA's comment here was a direct response to Insaulgarat's comment...")

[22] *See, e.g., Combs*, 379 F.3d at 575 (the district court's general instructions to the jury because the instructions did not specifically address the improper vouching.); *Weatherspoon*, 410 F.3d 1142 at 1151 ("...the curative instructions offered here did not neutralize the harm of the improper statements because '[t]hey did not mention the specific statements of the prosecutor.'").

APPENDIX A

FILED
OCT 13 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 04-15382
Plaintiff - Appellee,	D.C. NOS. CV-99-01329-GEB CR-96-00122-GEB Eastern District of California (Sacramento)
v.	
THOMAS SANDERS,	
Defendant - Appellant.	MEMORANDUM[1]

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding.

Submitted December 6, 2004[2]

Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

Thomas Sanders appeals pro se the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence following his conviction for perjury, in violation of 18 U.S.C. § 1623. We have jurisdiction pursuant to

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[2] This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

28 U.S.C. § 2253. We review de novo, *see United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003), and affirm.

Sanders contends that the prosecutor's alleged misstatements in closing argument deprived him of Due Process. We are unpersuaded. Prosecutorial misconduct may warrant reversal when the prosecutor's remarks "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of Due Process." *Davis v. Woodford*, 384 F.3d 628, 644 (9th Cir. 2004) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Improper argument to the jury does not constitute reversible error unless it causes prejudice without remedy by the trial judge. See *United States v. Lopez-Alvarez*, 970 F.2d 583, 597-98 (9th Cir. 1992) (dismissing prosecutorial misconduct charge because the jury was instructed that "the lawyers' statements are not evidence," and this was sufficient to neutralize any prejudice).

Here, because the prosecutor's statements were a reasonable inference based on evidence presented at trial, they did not so infect the trial with unfairness as to make the resulting conviction a denial of Due Process. See *Davis*, 384 F.3d at 644.

Further, at the start of trial and immediately after closing arguments, the district court admonished the jury not to consider the attorneys' statements and arguments as evidence. *See Lopez-Alvarez*, 970 F.2d at 597-98. Accordingly, we affirm the district court's judgment.

Sanders' request to broaden the certificate of appealability is denied. See 9th Cir. R. 22-1(e).

AFFIRMED.

APPENDIX B

FILED
DEC 02 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 04-15382
Plaintiff - Appellee,	D.C. NOS. CV-99-01329-GEB CR-96-00122-GEB Eastern District of California (Sacramento)
v.	
THOMAS SANDERS,	
Defendant - Appellant.	ORDER

Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied. No further filings will be accepted in this closed appeal.

APPENDIX C

FILED
OCT 31 2003
CLERK, U.S.DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent. CR S-96-0122 GEB JFM P

v.

THOMAS SANDERS,

Movant FINDINGS & RECOMMENDATIONS

_____/

Movant is a former federal prisoner proceeding pro se with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Movant challenges his 1997 conviction on one count of perjury before a grand jury.[1] Movant claims that he received constitutionally ineffective assistance of counsel when his attorney failed to object to alleged false and misleading statements by the prosecutor during closing

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[1] The indictment read: "[D]efendant Thomas Sanders when being questioned about what happened to certain boxes of documents that were located at 85 17 North Weyerhauser, Portland, Oregon, falsely stated they were 'not recognizable, burnt,' in a fire that occurred at that location on July 8, 1993, when in truth and in fact, as the defendant well knew, the said documents had not been burned." (March 22, 1996 Indictment.)

argument, and when his attorney failed to conduct an adequate investigation and to pursue exculpatory evidence.

The court construed petitioner's last claim as a contention that the prosecutor committed misconduct during closing argument by mischaracterizing movant's testimony and presenting false and misleading arguments to the jury. (See March 14, 2001 Order at 2.) Further briefing was ordered, and movant's motion is now before the court.

I. Prosecutorial Misconduct

The court will first address movant's contention that the prosecutor committed misconduct during closing argument by mischaracterizing movant's testimony and presenting false and misleading arguments to the jury. The pertinent portions of the prosecution's closing argument on January 8, 1997 were as follows:

> The answer is very simple. Two people lied up there. Either the people are the defendant, Thomas Sanders, and Genevieve Rich, his girlfriend; or Lieutenant Ligatich and the defendant's expert, Jim Hart. That's what you have to decide, because, among other things, the defendant's telling you there was some records upstairs in the attic; everything in the attic burned. Now, that statement's either true or it's false. And you heard conflicting testimony on that. Well, how do we decide, if we're going into that, who lied? How are you going to figure this out? Tough question. Well, let's look at why would somebody lie. Look at two things: the motive a person has to lie to you or the grand jury; and the testimony itself. Let's look through these four people. These are the four significant people.
>
> What motive does the defendant have to lie? Well, he's on trial, on trial for a felony. That's what this is; that's what perjury is. That gives him a reason why he might want to

lie. You know that he's changed his testimony. It's the flavor of the month with him. He's got a bad history of it. In December 1995 -- unless you think that Agent Danielson lied on the stand—in December 1995 he knows for sure these records are up in the attic. In the deposition in January of 1996, one month later, "I don't recall whether there are any Shipper's Dispatch documents there or not." And in March of 1996, two months later, "Oh, yeah, they were there." That's the record of his testimony in the past.

And you know what he said about that. But before you guys can look at his past testimony, see inconsistencies in his past testimony, what he has done in the past—does he have a reason to lie? Yes. Is his past testimony a problem? Yes. Is his testimony on the stand a problem? Sure. Testifies that certain things don't happen, documents are burned—by the way, you remember when we talked about whether the documents were burned beyond recognition, remember Defense Exhibit A, and you guys look at the documents over here in the corner (indicating). They're not even brown. These are the ones the defense has told you were some of the documents that were there, some that Lieutenant Ligatich didn't carry out, if you believe the defense. You'll have this exhibit in there. You can decide whether or not when he told the grand jury those documents burned, were not recognizable, whether the documents referred to by them—this is by the defense—whether that's true.

The other person we have is Genevieve Rich. Motive to lie? She's lived with the defendant for eight years. Presumably she's very attached to him, probably loves him. One reason to lie: to protect a loved one. Because what the Government's alleging is that this man lied to protect his brother, because he knew his brother was under investigation.

And look at some of her testimony. On cross-examination, she also said everything in that room burned, in the computer room. That is Genevieve Rich's testimony on cross—although on direct she said that they carted out a couple boxes of documents. You have to decide whether her testimony internally is inconsistent and shows that it is not credible. Is she credible? Clearly the evidence shows neither she nor the defendant is credible.

Now, let's look at the other two people on the other side of the equation, forgetting for a moment now Larry Danielson, who the defendant has said couldn't get his stuff straight, what Larry Danielson told you. This is the defendant who, you'll see from the grand jury transcript, has a hard time remembering stuff, who you heard from the deposition I read is sort of not too sure, but when he talks to Larry Danielson, who he doesn't expect to come out and isn't prepared for, he's got a good memory. And you heard him on the stand. Is his memory bad? Even more time elapsed. His memory's crystal clear. You decide whether or not this is evidence of truth or falsity. And look at Lieutenant Ligatich. Motive to lie? He's a fire lieutenant for the Portland Fire Bureau, doesn't work for the federal government, even. He has no reason to lie. Why's he going to lie?

His testimony? Well, a little discussion about the computer, could have been moved. Mr. Hart wasn't sure about it. You heard the problems that Lieutenant Ligatich said. But remember, this case isn't about the computer. He's not charged with saying anything about the computer, although you'll—you saw the computer and you heard at the grand jury he said the computer melted. And guys—that's (indicating) not a melted computer.

So Lieutenant Ligatich has no reason to lie at all, no motive. And his testimony, except with some possible questions on the part of the computer which is the nonrelevant portion of his testimony, is not contradicted. It is internally consistent. He testified some such thing—which contradicted the defendant—as "there was nothing in the attic; I know; I was there." Is that contradicted by anybody? By Mr. Hart? No. It's consistent with their expert.

And Mr. Hart. Motive to lie? He's the defendant's own witness. What motive would he have to say, as you heard me finally drag it out of him after he got into the usual expertise, that "No, there was nothing in the attic, and anybody who told you that there was something in the attic lied to you." And that is the testimony given by the man over there (indicating), Mr. Hart, the defendant's own expert.

You guys have to decide credibility. Are you going to rely on their expert? On Lieutenant Ligatich? Or are you going to rely on the defendant and his girlfriend? And, guys, it really comes down to that simple. That's really what it all boils down to.

What this shows is that, between Exhibit A and Mr. Hart and Lieutenant Ligatich, is that there was no fire in that bedroom. You know there was no fire in that bedroom. When the defendant says in the grand jury, "burnt," that is a lie. You know there was no fire in the bedroom; you know there was nothing in the attic. When he talks about records in the attic, you know there were no records in the attic. And that you know what happened to those records is Lieutenant Ligatich brings them out, puts them in the car.

Because otherwise, to come up with another conclusion, you have to conclude that Mr. Hart doesn't know what he's

talking about and lied to you, the defense expert; that Lieutenant Ligatich lied to you; and that Larry Danielson lied to you. And there's no reason for these guys to lie.

You know that he intended to lie because, among other things, he was given an opportunity after he left the grand jury to go back and correct it. So he intended to stay with it. And he gave you the same lies that he gave to the grand jury. You will see again—you've heard the grand jury testimony. If you want to, you can re-read it. It'll be there for you. And he told you and he told the grand jury about all these records upstairs in the attic. And you people know that is a total and absolute, complete lie. You want to believe the man who you know lied to you? Because that's what this case is about. It's about lying in the grand jury, and you know that he did that because you know he lied to you.

You know that also because, looking at his past, the flavor of the month, the records are in the attic, from Larry Danielson, and you heard him up there. He had contemporaneous notes; he wrote them down at the time. "I know exactly what he said," Mr. Danielson told you. Remember he was up here? And I said, "Well, how did you know that?" And Larry Danielson said—and as he dragged out his records, he said, "Oh, because I took these records, contemporaneous records. As he was talking, I wrote down the notes. I got a lot of it in quotes."

Larry Danielson lying or mistaken? No. And yet you heard the deposition testimony just a month later: "I don't remember what's upstairs." This is a man who doesn't know what he needs to do to help his brother who is in trouble, but he is he going to try to do it by being evasive. And, again, you heard the grand jury testimony. You'll see the grand jury testimony. It's shot with evasion. And it's the

pinning down, when I said, "Please, how was this stuff damaged?" that he finally makes a mistake and he pins himself down and he lies. And that's what this case is about: the importance of the integrity of the grand jury as well as the trial process, of you cannot lie when you're on the witness stand.

Stuff burned in the bedroom? Well, you've heard that from the defendant and his girlfriend, and you heard the defense's own expert say nothing burned in that bedroom—along with Lieutenant Ligatich.

Shipper's Dispatch records were in a box. The boxes would have given some protection. Mr. Hart was sort of wavering, "Well, maybe it would. Maybe it wouldn't. I don't know." Lieutenant Ligatich was clear about it. He saw the boxes. He would be in a better position to tell you whether these boxes would have done anything. Mr. Hart says, "Well, it depends on what kind of box it is," but he didn't see the boxes. Lieutenant Ligatich, who you know is an expert, a man who gives instruction on fire investigation, tells you, "Those boxes, I saw them. I carried them out they would have given extra protection."

So what you know is clear. Again, it's a credibility question. If you people decide that Lieutenant Ligatich and Mr. Hart, the defense witness, and Larry Danielson lied to you, if that's what you think, then as a prosecutor I am telling you, acquit that man. You must, if you believe those three people lied to you, you must walk that man. But if you think those three people told you the truth, then he is guilty of perjury, of lying to that grand jury, when he said the records were "unrecognizable, burnt," and you must convict.

[RT 184-193] Movant's grand jury testimony was read into the trial court record:

Q. Can you describe the damage [from the fire]?
A. The damage was totaled to the contents as far as fire and smoke damage.
...
Q. And what about the damage [in the attic]?
A. I never saw the attic.
Q. And you were living in the house that Shipper's Dispatch owned; is that right?
A. Yes, rented.
...
Q. Now, were there some of the boxes of documents of Shipper's
Dispatch in the structure?
A. I have stated before, I can't think of any particular ones, except some computers disks and records.
Q. What records you talking of?
A. I later saw a photograph where there is a computer printout, a picture of one. And the only reason that would be in the house would be - I recognize the type of thing as being an ongoing trip log fkom Shipper's Dispatch.
...
Q. So, what documents fiom Shipper's Dispatch - or how - let's - let me back up for a second. Was there any boxes of records that were of Shipper's Dispatch records that were in (RT 34) the property?
A. I can't say for sure whether there were or not. I could say I was told there were, and I seen a photograph, two different items appeared to be records from Shipper's Dispatch.
Q. Well, wait a second. You were living there, right?
A. Yes.
Q. Were there any boxes in some of the rooms?
A. No, up in the attic.
Q. Oh, they were in the attic?
A. Yes.
Q. Okay. So there were no boxes - definitely what you can say, is there were no boxes of Shipper's Dispatch records downstairs?

A. Not in my living area, no.
Q. In any of the - or any of the bedrooms?
A. No.
Q. No - there were no boxes or no what? In other words, there was - am I correct when I say that there were no boxes of Shipper's Dispatch records in any of the bedrooms downstairs?
A. Well, I can say there wasn't one in the bedroom we lived in or the other bedroom. And this other bedroom I can't say for sure.
Q. You never went in there?
A. Yes, I was in there quite often.
Q. Okay. Well, were there any boxes of records in there?
A. I had several boxes on the floor.
Q. Okay. Several of your boxes. Were there any - were there any boxes in the other bedrooms?
A. Not any one that I can specifically state.
Q. Wait a second. Let me just back up to see if we can - because I'm kind of a little confused here, which is a state that I'm - as the grand jury knows I'm in fairly often. In two bedrooms you were living - one for you and one for Ms. Rich?
A. No, we shared the same bedroom.
Q. Oh, you shared the same bedroom, okay. So, were there any boxes in that bedroom, period?
A. No, there wasn't, no.
Q. Okay. Now, there's a second bedroom.
A. Right.
Q. And what's that used for? What was ... that used for?
A. The middle bedroom I had my computer set up in there.
Q. Okay.
A. Yes.
Q. And there were no boxes of records in that room?
A. There were many boxes. I can't state for sure if any one - I can't sit here and say with certainty that one of them did not contain records.

Q. But if there were boxes than rather - oh, it was only one box?
A. No. There was several boxes.
Q. Well, what was in them?
A. I had about three boxes of my personal equipment - my personal records.
Q. Okay. And then how many other boxes of records were there.
A. I don't know any number.
Q. One, a hundred?
A. Not a hundred. There were maybe - maybe five or six.
Q. Five or six boxes of records down there.
A. Well, I mean, you said "boxes." I can't picture what was in that room at this late date. I can picture where my things were. It was just - we had a stack of boxes on the corner. And the other corner was my computer.
Q. And in this third bedroom, what was in there?
A. There was just a bed.
Q. So no records at all?
A. No records at all in there, no.
Q. Okay. So the only place there were records of any kind is that middle bedroom with your computer; is that right?
A. Well -
Q. There were boxes, other than the attic which we'll talk about in a -
A. No, right, right, right, yeah.
Q. Okay.
A. That would have been the only other place they could have been.
Q. Okay. Now, in the attic, what was in the attic?
A. In the attic was boxes full of everything, my stuff, there was boxes.
Q. Lots of boxes?
A. Lots of boxes, right.
Q. And were there boxes of records up there as far as you know.
A. Again, I can't say that any particular one.

Q. But there were a whole lot of boxers which had paper in them?
A. Yes. Yes.
Q. Okay. You don't know what was in the boxes?
A. No. Not all the boxes. I know what was in the boxes I put up there.
Q. But you don't know what was in the other boxes?
A. No.
Q. All right. Now, after the fire or because of fire, were any of those records damaged?
A. I presume everything in the attic was damaged.
Q. Why do you presume that?
A. Because I never saw it again.
Q. Okay. You never saw all the boxes that were up in the attic?
A. No.
Q. Okay. How about the boxes that were in the bedroom?
A. When I went back, I believe it was the next day, the fireman had pulled - before the house was boarded up, the fireman I believe on the night of the fire told me they had thrown a tarp in one comer of the bedroom to cover up whatever was on the floor. So I went in, picked up the tarp, and there were my boxes I had a box of books and I had a box of personal files. And they were smoke damaged, but they weren't burned. They were still useable. They were records I've accumulated over many years so I took those boxes.
Q. And what else was in - what other boxes of records were still there?
A. I didn't see any others.
Q. So the only box that were left when you cane back were those two boxes?
A. I'm not saying the only two boxes. The only two boxes I picked up were those two boxes.
Q. So you only picked up two boxes?
A. Right.
Q. What about -

A. Possibly three, I'm not sure.
Q. Possibly three, and what other boxes - would you leave these boxes in there? When you left that day, you said you came back the next day.
A. Right.
Q. When you came back did you leave any boxes - and cleaned out the three boxes we just talked about, did you leave any boxes sitting in the mom?
A. It's been so long I don't recall what else was in there because everything else in the room was heat and smoke damaged.
Q. So, what you're saying is that what you took was the only boxes that were still in one piece, the rest had been damaged by heat or smoke damage?
A. I just took the ones I recognized as being mine.
Q. And you didn't care about the other ones?
A. It's not a matter of - I don't understand your question.
Q. You didn't want to make sure the other ones were going to be safe and put them someplace?
A. I don't recall what - I just took the - I'm just saying I took the boxes of my records that next day.
Q. And what about the other records that were there?
A. I have no idea.
Q. You just left them?
A. Yes, I just took what - I didn't want to spend too [much] time in the house. I just took my records and went.
Q. Were those - where they damaged, the other records?
A. I don't recall.
Q. They were in the same room with yours, you don't remember whether they were damaged and yours weren't?
A. No, no, I don't. I can think - if they weren't damaged I would have checked them. But I just checked the ones I saw were covered by the tarp. They were my records.
Q. So what -how many boxes were left?
A. I don't recall.
Q. One, a hundred?
A. I don't recall.

Q. No recollection at all?
A. No.
Q. There was a computer?
A. Yes.
Q. How many computers were in the building?
A. One.
Q. And that was yours?
A. It was - it was actually - I had custody of it. It belonged to the - it was bought by Shipper's Dispatch.
Q. And what was on it?
A. What was on it?
Q. Yes.
A. A number of things.
Q. Such as?
A. I mean, I had a disk full of software on it.
Q. Just your material?
A. No.
Q. What else was on it?
A. It all came from the office. I had Paradox, which was the database that was used at that time for the computer system at Shipper's Dispatch.
Q. Was there any Shipper's Dispatch information on it?
A. I'm sure there was because I did development on there.
...
Q. What happened to the computer?
A. I gave the owner of the house permission to dispose of everything that was left in the house as he saw fit.
Q. Okay. Now did - well, would that include the records of Shipper's Dispatch?
A. Anything that was in the house that was - everything inside was destroyed. I took what was not destroyed except my wallet. Luckily I found it in my pants on the bed the next day.
Q. So your testimony is if you didn't take it out, the reason you didn't take it out was because it was destroyed?
A. I'm saying I didn't take anything out. And then I -
Q. Well, you said you took two or three boxes.

A. Everything - I assumed everything was destroyed. Yes.
Q. You said two or three boxes of stuff!
A. Yes. Yes, they were salvageable.
Q. What about your clothing?
A. Clothing was - nothing was salvaged.
Q. Nothing was salvaged on the clothing?
A. Nothing. Nothing.
Q. So that was all destroyed and you left it?
A. Except my wallet which I found on the blue jeans that were on the bed....
...
Q. Okay. And everything in the attic as best you could see -
A. I never saw the attic. I never went up there.
...
Q. So all those boxes that were up in the attic -
A. Well, I saw a lot of them out in the front yard in another picture, but that's - I couldn't tell where they came from.
Q. Now, so let me just see if I have this right. Did you take - you took three boxes of your stuff out of the middle bedroom?
A. Well, maybe three, I'm not sure of the exact -
Q. Maybe two, maybe three?
A. Yeah.
Q. Three at most?
A. Right.
Q. Maybe two. Is that right?
A. Yes.
Q. Okay. Every - the reason you didn't take the other stuff as now I understand it is because the other stuff was destroyed?
A. Yes.
Q. Okay. And it was destroyed by fire or by smoke?
A. Fire, smoke, heat, whatever.
Q. So - but it was - they were just ruined by the fire - they were actually burned, I mean, opposed to burned with a match, flame-type destroyed?

A. No, they were discolored by heat and smoke. And they had that smoke smell that you'd never get out.
Q. But if there was a document, would it make any difference to you? I mean, wouldn't you care to want to save the document?
A. Well, I saved - that's what I did.
Q. You saved yours?
A. Yes, everything else was -
Q. And you didn't save the other ones?
A. Everything else was damaged. If it was -
Q. Now by damage -
A. I took -
Q. - what do you mean by damage, that's what I'm trying to find out here.
A. Not recognizable, burnt.[2]
Q. Oh, okay. Fine.
A. Yeah.
...
Q. ...And did you load the records by yourself or did anyone help you?
A. As I recall that when I went out the next morning my brother met me out there. We went through the house together and I took the - I can't recall exactly, but I believe I took them out by myself.
Q. Okay. And the firemen, they were all gone by the time -
A. Oh, they were gone the night before.
Q. Okay. And so they didn't help you load any records out or anything?
A. No. No, I don't recall seeing any firemen except a -
Q. When you showed up to load the records of the -
A. Right.
Q. Okay. Now, you remember being interviewed by Special Agent Robert Nino of the F.B.I. down in Texas?
A. I don't remember the name. There were -
Q. It was a special agent, though, you remember him?

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[2] This was the alleged perjurious statement.

A. I don't think that was the name. It was a -

Q. There was also a Lawrence Danielson?

A. That's the one, right.

Q. Okay. There were two guys, actually?

A. Right. Yeah. Danielson didn't do all the talking.

Q. Okay. And do you remember telling him that there were some boxes of business records from your brother's business which was stored in the attic?

A. I told him that I believe there were, but that I didn't - I could not give one specific, any specific single instance of a boxes exactly what was in it.

Q. Okay. But you -

A. I never said that there was one specific box. I never said -

Q. No, you said some boxes of business records of your brother's business that was stored in the attic?

A. That were probably - right.

Q. And that was a true statement; is that correct?

A. Well, that's what I believe to be true.

Q. But you - okay.

A. Probably because Shipper's Dispatch had access to the house and the attic, so that's - I was told there were records there so I presume there were. Now, I can't - like I told him. I think that was taken the wrong way. I can't think of any single specific - I can't say there was a box in this comer with so and so in it, but -

Q. But you know when you'd go to the attic, because you said some of your own stuff was there.

A. Very seldom. Very seldom. I put my stuff up there when I first moved in. And I very seldom went up there again.

Q. But there were boxes of stuff up there?

A. Yes.

Q. At the time of the fire?

A. Right.

Q. And remember telling that the firemen removed everything from the attic and put it in the front yard and you said there's nothing salvageable from the attic.

A. No, I said I assumed they did because I never saw it again.
Q. Okay.
A. I have no idea what happened to what was in the attic because they - the next time I went to the house right after I had taken my wallet and my personal records out, the last time - the next time I went back, the house was totally boarded up by the owner or the insurance company or whatever.
Q. Okay.

[RT 31-53]

The Supreme Court has recognized that prosecutorial misconduct may "so infec[t] the trial with unfairness as to make the resulting conviction a denial of Due Process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). To constitute a Due Process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *United States v. Bagley*, 473 U.S. 667,676 (1985) (Quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)). When a defendant contends that a prosecutor's question rendered his trial fundamentally unfair, it is important "as an initial matter to place th[e] remar[k] in context." *Darden v. Wainwright*, 477 U.S. 168, 179 (1986); *see Donnelly*, 416 U.S. at 639 (determining whether "remarks, in the context of the entire trial, were sufficiently prejudicial to violate respondent's Due Process rights").

This court has reviewed the trial record and describes the context of the trial as follows. The trial judge gave the jury initial instructions. He advised the jury that it was their duty to discern the facts from the evidence, and that the facts would consist of testimony of witnesses, documents and other items received into evidence as exhibits and any facts on which the lawyers agreed or which the judge instructed the jury to accept. (RT 10.) The trial judge admonished the jury that the following

things were not evidence: statements and arguments of the attorneys; questions and objections of the attorneys; testimony that the trial judge instructed the jury to disregard; and anything the jury saw or heard when court was not in session. (RT 12.)

Both the prosecution and defense counsel gave opening statements. Thus, the prosecutors' closing argument should be evaluated in light of the defense argument that preceded it, which stated that the house on Weyerhauser

> was pretty much engulfed -- I mean, it wasn't burned to the ground, but in terms of damage -- the terms of damage to the contents was total. By that, I mean all the personal property they lost. The only thing they took out of that house were two boxes of some personal papers and some books. That was it. Nothing else was taken out. Oh, and he did go back and get his wallet....But other than that, no clothing, no shoes, no furniture, the computer wasn't taken out -- none of the documents that were in the house were taken out by Mr. Sanders. He just regarded it as a total loss, took the few boxes that he could salvage, and that was it.

(RT 24.) Defense counsel articulated the crux of the case as whether there were any documents in the house and whether they were destroyed. (RT 24-25.)

Defense counsel also raised the issue of movant's January 1996 testimony in a civil case between movant's brother and another private party, where movant was called as a witness by phone to talk about the fire, and counsel argued that movant was unprepared for that testimony, and specifically that movant had not viewed any photographs from the fire. (RT 25.)Defense counsel stated that between that testimony and movant's March 1996 grand jury testimony, movant had the opportunity to review photographs from the fire, which refreshed movant's recollection as to whether any Shipper's Dispatch records were

in the computer room of the Weyerhauser home at the time of the fire. (RT 25-26.)

Defense counsel stated movant would freely admit that his answers in the civil case appear to be different than the answers provided the grand jury, but that "it wasn't that he did it with intent." (RT 26.) Defense counsel concluded his opening statement by arguing that movant was faced with a Catch 22 situation after his grand jury testimony: movant had to either go back into the grand jury, change his story and commit perjury to avoid a perjury charge, or he could refuse to go back into the grand jury and refuse to commit perjury and then be charged with perjury. (RT 26-27.)

Closing arguments came at the end of two days of trial. After closing arguments, the jury was again admonished that statements and arguments by attorneys were not to be considered as evidence. (RT 211.)

In his motion, movant scrutinized the prosecution's closing argument and contended that because the prosecution falsely attributed statements about the attic to movant no less than eight times in his closing argument (traverse at 13), the jury was allowed to reach the incorrect inference that movant lied to the grand jury because he lied to the present jury as well. Id. However, the focus of this case was whether movant lied to the grand jury when, after it was established that Shipper's Dispatch records were in the structure (RT 33), movant was being asked why he did not remove anything other than two or three boxes that belonged to movant from the house after the fire, and he described the destruction of certain boxes as "not recognizable, burnt":

> Q. Now, so let me just see if I have this right. Did you take - you took three boxes of your stuff out of the middle bedroom?
>
> A. Well, maybe three. I'm not sure of the exact -

Q. Maybe two, maybe three?
A. Yeah.
Q. Three at most?
A. Right.
Q. Maybe two. Is that right?
A. Yes.
Q. Okay. Every - the reason you didn't take the other stuff as now I understand it is because the other stuff was destroyed?
A. Yes.
Q. Okay. And it was destroyed by fire or by smoke?
A. Fire, smoke, heat, whatever.
Q. So -but it was - they were just ruined by the fire - they were actually burned, I mean, opposed to burned with a match, flame-type destroyed?
A. No, they were discolored by heat and smoke. And they had that smoke smell that you'd never get out.
Q. But if there was a document, would it make any difference to you? I mean, wouldn't you care to want to save the document?
A. Well, I saved - that's what I did.
Q. You saved yours?
A. Yes, everything else was -
Q. And you didn't save the other ones?
A. Everything else was damaged. If it was -
Q. Now by damage -
A. I took -
Q. -what do you mean by damage, that's what I'm trylng to find out here.
A. Not recognizable, burnt.

(RT 48-50.)

Both movant and Ms. Rich, movant's girlfriend, testified there were boxes in the attic. Movant testified in his grand jury testimony that he presumed everything in the attic was damaged. (RT 37.) But movant did not specifically state before the grand jury that the boxes in the attic burned. However,

Special Agent Lawrence Danielson of the FBI testified that during a December 15, 1995 interview, movant told him that Shipper's Dispatch records had been stored in the attic and that Shipper's Dispatch records in the attic were destroyed in the fire. (RT 73-74.) During the trial, during cross-examination, movant confirmed those statements made to Agent Danielson:

> Q. So let me just see if I've got this right. So now, assuming Mr. Danielson didn't get it totally screwed up, you told him in December - you said in December you recalled there were Shipper's Dispatch records in the attic; in January of 1996 you weren't sure; and in March 1996 you were sure that they were in the attic and in the middle bedroom. Is that correct? Is that your testimony?
> A. Whatever's in those statements is what I believed to be true at the time.

(RT 146.) In his grand jury testimony, movant further confirmed this statement:

> Q. And do you remember telling him that there were some boxes of business records from your brother's business which [were] stored in the attic?
> A. I told him that I believe there were, but that I didn't - I could not give one specific, any specific single instance of a boxes exactly what was in it.

(RT 53.) Thus, the prosecutor was allowed to use these admissions by movant during closing argument:[3] "You know that also because, looking at his past, the flavor of the month, the records are in the attic, from Larry Danielson, and you heard him up there." (RT 192.) This statement was not erroneous because of Larry Danielson's testimony.

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[3] During cross-examination, movant stated that if he had recalled specifically that there were Shipper's Dispatch records in the attic during the interview with Agent Danielson, that was a misstatement. (RT 145.) The jury would have to decide the credibility of movant versus Agent Danielson.

The prosecutor's arguments that movant lied during the trial were also not unfounded on evidence presented at trial. In his grand jury testimony, movant testified that there were boxes in the attic. Mr. Ligatich testified that there was nothing in the attic. Movant's expert, Mr. Hart, testified that nothing in the attic burned. This testimony was sufficient to raise an inference that someone was lying about what was in the attic. Thus, it was not error for the prosecutor to argue that movant lied during the trial.[4]

Moreover, there was conflicting evidence as to the amount of damage resulting from the fire. Movant claimed the fire damaged the room housing the computer and argued that the heat from the fire blackened the thermal paper records from Shipper's Dispatch, thus supporting his statement that material in the house was "unrecognizable, burnt." Ms. Rich, movant's girlfriend, also testified that nothing from the house was salvageable, except for the few boxes and the wallet movant removed the day after the fire. During his grand jury testimony, movant testified that "the damage was totaled to the contents as far as fire and smoke damage." (RT 31.)

Mr. Ligatich, on the other hand, testified that the flames were restricted to the kitchen area and were extinguished in ten minutes. Mr. Ligatich further testified that, because the bedroom door to the computer room was closed, the damage to that room was limited and there was no flame damage to the room contents. Mr. Ligatich and Mr. Hart also testified that there were no flames in the attic.

Finally, the court notes that the jury was properly instructed, both before and after the trial, that statements and

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[4] It was also not unreasonable for defense counsel to argue that Mr. Ligatich was mistaken about nothing being in the attic, which he did.

arguments of attorneys were not to be considered as evidence. (RT 12,211.)

The prosecutor was, on two occasions, overzealous in attributing statements to the movant: 'The defendant's telling you there was some records upstairs in the attic; everything in the attic burned." (RT 187.) "And he told you and he told the grand jury about all these records upstairs in the attic." (RT 191 .) The movant, in his grand jury testimony, testified there were boxes in the attic. "Q. Were there any boxes in some of the rooms?" A. No. up in the attic." (RT 34.) "Q. But there were boxes of stuff up there? A. Yes. Q. At the time of the fire? A. fight." (RT 53.) During the jury trial, movant testified as to what items from Shipper's Dispatch were located in the computer room. (RT 122-125.) Movant did not testify that there were records in the attic or that those records burned. However, Ms. Rich testified she put boxes in the attic and movant helped her put boxes in the attic. (RT 111-12.)

Under this standard of review, this court cannot find that the prosecution's closing argument deprived petitioner of a fair trial. The prosecutor's argument, while overzealous, did not manipulate or misstate the evidence because there was evidence to support the prosecution's arguments. This court cannot find that the prosecutor's closing argument resulted inprosecutorial misconduct, or that it rendered movant's trial findamentally unfair. Darden, 477 U.S. at 179. This claim should be denied.

II. Ineffective Assistance of Counsel

Movant alleges he received constitutionally ineffective assistance of counsel when his attorney failed to object to alleged false and misleading statements by the prosecutor during closing argument, and when his attorney failed to conduct an adequate investigation and to pursue exculpatory evidence.

To support a claim of ineffective assistance of counsel, the movant must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. movant identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the *Strickland v. Washington*, 466 U.S. 668, 688 (1984). After a movant identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professional, competent assistance. -- See *Id.* at 690. "There is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" *Kimmelman v. Momson*, 477 US. 365, 381 (1986) (quoting *Strickland*, 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable professional judgment in all significant decisions made." *Hufies v. Borq*, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland*, 466 U.S. at 689).

After demonstrating that counsel's performance fell below an objective standard of reasonableness, a movant must affirmatively prove prejudice. See *Strickland*, 466 U.S. at 693. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* Under this prong of the test, a court cannot find that counsel was ineffective unless the court determines that the entire trial or other proceeding was "fundamentally unfair or unreliable" because of counsel's ineffectiveness. *Lockhart v. Fretwell*, 506 U.S. 364, 368-69 (1993).

A. Failure to object to alleged false and misleading statements by the prosecutor during closing argument

Because this court has found that the prosecutor's closing arguments were properly based on evidence before the court, movant's trial counsel cannot be found ineffective for having failed to object to the prosecutor's closing argument. Movant cannot show that but for trial counsel's failure to object to the closing argument, the result of the proceeding would have been different, because there was evidence in the record to support the statements made by the prosecution. Any objection made by trial counsel would have been overruled. Thus, this claim must fail.

B. Failure to conduct an adequate investigation and to pursue exculpatory evidence

Movant contends that his trial counsel was ineffective because he failed to obtain photographs from the state fire marshal's office. Movant states these photos "undoubtedly would have provided exculpatory evidence for the defense" (motion at 8), because they would have shown items "not recognizable, burnt" (*Id.* at 9) and thus would have prevented a perjury conviction. (*Id.*) Respondent contends that this claim rests on unsupported speculation and that movant has failed to meet his burden to prove this claim.

Movant has not presented any evidence of the type identified in *Schlup* as reliable "actual innocence" evidence -- "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *See Schlup v. Delo*, 513 U.S. 298,324 (1995). Movant has not provided the fire marshal's photographs, nor has he provided an affidavit from someone who compared the fire marshal's photographs with the photographs used at trial. Thus, movant's claim is based on uncorroborated speculation that the fire marshal's photographs would show items "unrecognizable, bunt," or that these photographs substantially differed from the photographs presented at trial. Moreover, movant acknowledges that trial

counsel was aware of these photographs and concedes he does not know whether his trial counsel actually viewed the fire marshal's photographs. (Motion at 16, n.23.)

Speculation about what impact these photographs might have had is not sufficient to sustain a § 2255 motion. Thus, movant has failed to demonstrate that trial counsel was ineffective for failing to produce the fire marshal's photographs at trial, and this claim should also be denied.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Movant's July 9, 1999 motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 be denied; and

2. The clerk of the court be directed to close the companion civil case No. CV S-99-1329 GEB.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections shall be filed and served within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the district court's order. See *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: **October 30, 2003**.

s/John F Moulds
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

FILED
JAN 14 2004
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent, CR S-96-0122 GEB JFM P

v.

THOMAS SANDERS,

Movant ORDER

_____/

Movant, a federal prisoner proceeding pro se, has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On October 31, 2003, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. After obtaining an extension of time, movant filed objections to the findings and recommendations. Respondent has filed a reply.

In accordance with the provisions of 28 U.S.C. § 636(b)(l)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed October 31,2003, are adopted in full;

2. Movant's July 9, 1999 motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 is denied; and

3. The Clerk of the Court is directed to close the companion civil case, No. CV S-99-1329 GEB JFM.

DATED: **January 13, 2004**.

s/Garland E Burrell
UNITED STATES DISTRICT JUDGE

APPENDIX E

FILED
FEB 18 2004
CLERK, U.S.DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent, CR S-96-0122 GEB JFM P

v.

THOMAS SANDERS,

Movant ORDER

_____/

Movant, a federal prisoner proceeding pro se, has timely filed a notice of appeal of this court's January 14,2004 denial of his motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. Before movant can appeal this decision, a certificate of appealability must issue. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate of appealability must "indicate which specific issue or issues satisfy the requirement. 28 U.S.C. § 2253(c)(3).

A certificate of appealability should be granted for any issue that movant can demonstrate is "'debatable among jurists

of reason,"' could be resolved differently by a different court, or is "'adequate to deserve encouragement to proceed further."' *Jennings v. Woodford*, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting *Barefoot v. Estelle*, 463 U.S. 880,893 (1983)).

Movant has made a substantial showing of the denial of a constitutional right in the following issues presented in the instant motion: whether the prosecutor committed misconduct during closing argument by mischaracterizing movant's testimony and presenting false and misleading arguments to the jury.

Accordingly, IT IS HEREBY ORDERED that a certificate of appealability is issued in the present action.

DATED: **2/17/04**

s/Garland E Burrell
UNITED STATES DISTRICT JUDGE

APPENDIX F

Department of Justice

Office of Professional Responsibility

Washington, D.C. 20530

FEB 25 1999

MEMORANDUM
TO: Donna Bucella
Director, Executive Office for United States Attorney
FROM: H. Marshall Jarrett
Counsel
SUBJECT:Complaint against [**AUSA Daniel S. Linhardt**]

Thomas M. Sanders alleged in a letter to this office that [**AUSA Daniel S. Linhardt**] committed professional misconduct while prosecuting him and [**his brother, James H. Sanders**]

Thomas Sanders alleged in his complaint that Linhardt 1) used false testimony, 2) made false statements to the trial judge, the jury, a probation officer, and the judge [**in his brother's case**], and the court of appeals, 3) engaged in witness vouching, and 4) attempted to inflame the jury. [**unknown text redacted: 3 lines**]

[**unknown text redacted**]. A copy is attached at Tab A.

I. Background

[**unknown text redacted: 9 line paragraph**]

In November 1995 [**unknown text redacted**] the complainant (Thomas), who had occupied the house at the time the subpoenaed records were purportedly destroyed by a fire, was interviewed by a Federal Bureau of Investigation (FBI) agent. Thomas told the agent that some of [**Shipper's Dispatch**

(a company administered by James H. Sanders)] records were stored in the attic and destroyed by the fire.

Thomas was granted immunity and appeared before the grand Jury investigating [**James H. Sanders**]. He testified that there were boxes in the attic at the time of the fire and that he presumed they were destroyed by the fire. Thomas claimed that he was unsure whether they were [**Shipper's Dispatch**] records. He also testified that there were boxes of documents in a middle bedroom that were damaged, specifically, "not recognizable, burnt." The latter statement was the basis of a subsequent perjury charge based on evidence that no documents in the bedroom had been destroyed during the fire and that Thomas had lied to corroborate [**James H. Sanders' statements to AUSA Linhardt**].

A jury found Thomas guilty of perjury on January 8, 1997. The district court denied a new trial motion and a motion for acquittal. Thomas appealed his conviction on the ground that there was insufficient evidence to support the verdict. The Ninth Circuit affirmed. *United States v. Sanders*, 141 F.3d 1182 (9th Cir.), *cert. denied*, 118 S.Ct. 2346 (1998).

[**unknown text redacted: 3 line paragraph**]

II. False Testimony and Failure to Show Exhibit to Expert

Thomas alleged that the government expert [**Lt. Joseph Ligatich of the Portland, Oregon Bureau of Fire (the senior fireman on the scene)**] knowingly gave false testimony regarding the extent of fire damage in the middle bedroom. According to Thomas, [**Linhardt**] then "cooked up" a theory to rehabilitate the after his credibility was damaged by conflicting evidence. Finally, Thomas asserted that the expert lied at both trials when he testified that he helped place six to eight boxes of documents in Thomas' car after the fire was extinguished.

[**unknown text redacted: 4 line paragraph**]

[**Linhardt stated that**] the expert's testimony was not false and noted that at Thomas' trial the experts for both sides testified that none of the records in the middle bedroom were destroyed during the fire.[1]

A. Fire damage in the middle bedroom

The government expert testified on direct-examination at [**Thomas Sanders' trial**] that the paint on the walls in the middle bedroom was "virtually undamaged" and that the room had sustained no heat or water damage. He also testified that the computer and documents in the room were not damaged.

On cross-examination, the expert was shown the photograph, purportedly of the middle bedroom, which the insurance investigator took two days after the fire. The photograph showed a room, as well as a computer, that had sustained heat and smoke damage. The expert initially stated that the room in the photograph was not the middle bedroom of the house that had caught fire. He subsequently conceded that certain parts of the room in the photograph matched those of the middle bedroom as depicted in another photograph. However, when the defense counsel asked him whether it appeared as though the computer had been placed in the room after the fire, the expert testified that there were indications that it had been. The expert also testified that he was shown the photograph before he testified.

At Thomas' trial, the expert testified that the middle bedroom sustained "very little" damage and that the walls had suffered some smoke damage. On cross-examination, he stated that the photograph taken by the insurance investigator might depict the middle bedroom but that the computer and desk were not the same ones that were in the room at the time of the fire. The defense expert, the insurance investigator who had taken

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[1] The defense expert did not testify at [**James H. Sanders' trial**].

the photograph, testified that it would have been very difficult to "stage" the fire damage in the bedroom as the government expert on direct examination had inferred might have happened.

B. The boxes

The government expert testified at both trials that the firemen helped Thomas put six to eight file boxes in Thomas' car on the day of the fire. When the defense counsel asked him about the size of the boxes at Thomas' trial, the expert said that they were about 30 inches by 18 1/2 inches by 12 to 14 inches. Thomas testified that his car could not hold more than three boxes and that he had taken away two boxes of personal records the day after the fire, not six to eight on the day of the fire.

Thomas submitted pictures with his complaint to this Office allegedly showing that his car cannot hold six boxes of the size described by the expert.

C. Findings

The expert's testimony regarding the damage to the middle bedroom was not entirely consistent at the two trials. Nevertheless, the inconsistencies could easily have resulted from the expert's faulty memory and they did not concern material facts (whether or not documents were destroyed during the fire [**unknown text redacted**]), the experts for both sides testified at Thomas' trial that none of the records in the middle bedroom were destroyed by the fire.

The expert testified consistently at the trials about the boxes; however, his testimony contradicted that of Thomas. Since Thomas claimed that he had removed two boxes of personal records from the bedroom, it was not his position that all of the documents in the room were destroyed. The dispute concerned the number and size of the boxes and what day Thomas removed them from the house. This testimony also did

not pertain to material facts and, if it was false, it too could be attributed to a faulty memory. More importantly, there is no evidence that [**Linhardt**] knew, or should have known, that any of the expert's testimony was false.

Thomas also suggested that [**Linhardt**] prompted the expert to testify that there were indications that the fire damage shown in the defense's exhibit might have been "staged to rehabilitate the witness after he failed on cross-examination to recognize that the room depicted in the photograph was the middle bedroom. This allegation is refuted by the fact that the expert initially inferred that the fire damage in the photograph might have been "staged" at [**James H. Sanders' trial**] when the defense counsel, not [**Linhardt**] asked him whether it appeared as though the computer had been placed in the room after the fire.

II. False statements

A. Trial Judge and Jury

1. Background

This allegation involves misstatements that [**Linhardt**] has admitted that [**he**] made to the jury during summation and later repeated to the probation officer and court.

[**Linhardt**] argued during summation that Thomas had told the jurors that items in the attic were destroyed by the fire. In fact, Thomas was evasive on cross-examination when he testified about the attic and did not specifically state that items in the attic were damaged.

> Q: So now, assuming [**Mr Danielson (FBI agent)**] didn't get it totally screwed up, you told him in December -- you said in December you recalled there were Shipper's Dispatch [**unknown text redacted (not in actual trial transcript)**] records in the attic; in January of 1996 you

weren't sure;[2] an in March 1996 you were sure that they were in the attic and in the middle bedroom. Is that correct? Is that your testimony?

A: Whatever's in those statements is what I believed to be true at the time.

The FBI agent testified that Thomas had told him in December 1995 that [**Shippers Dispatch**] records were stored in the attic and destroyed during the fire. The transcript of Thomas' grand jury testimony that there were records in the middle bedroom that were destroyed was read into evidence. The government and defense experts testified that the attic was not damaged by the fire. A girlfriend who was living with Thomas at the time of the fire testified that there were items in the attic which were destroyed during the fire.

During summation, [**Linhardt**] argued that Thomas had testified at his trial that items in the attic were burned. [**he**] asked the jury several times who was more credible, Thomas and his girlfriend, who claimed that items in the attic were destroyed, or the two experts, who had testified that nothing in the attic was destroyed.

The defense counsel did not object to the misstatement or address it during closing argument.

After Thomas was convicted, [**Linhardt**] told the probation officer who was preparing Thomas' presentence report that Thomas deserved a two-level enhancement for obstruction of justice because he had testified at his trial that items in the attic were destroyed. The probation officer, relying **[on Linhardt's statements, recommended the**] enhancement. Thomas filed an

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[2] During the trial, the government learned that Thomas was deposed in January 1996 in a civil case and had testified that he did not recall any of [**Shippers Dispatch**] records being in the house.

objection. At the sentencing, [**Linhardt**] conceded that the enhancement was not appropriate.

2. Findings

[**unknown text redacted: 6 line paragraph**]

Although it was careless of [**Linhardt**] to misstate the defendant's testimony, [**he**] [**unknown text redacted**] it was a mistake. The government presented evidence that Thomas had given three different statements about the fire (his statement to the FBI agent, his deposition, and his grand jury testimony). [**Linhardt**] did not need to risk intentionally misrepresenting the evidence in order to attack Thomas' credibility when there was so much impeaching evidence available to him.

B. Court of Appeals

1. Background

In the Statement of Facts of the government's appellate brief filed in Thomas' appeal [**Linhardt**] stated:

> Defense's fire expert, [**Joseph Ligatich**], who inspected the premises after the fire, testified that there was no evidence of any personal belongings in the attic at the time of the fire.... He said if anyone claimed there had been anything in the attic, that person would have lied.

Thomas claimed in his complaint to OPR that the statement was false because the expert had testified as follows:

> Q. Any evidence of any personal belongings there in the attic that were destroyed by fire?
>
> A. No.
>
> Q. So if anybody said to this jury that there were personal belongings that were in the attic and that burned in the fire, they would have lied; is that not correct, sir?
>
> A. That's correct.

2. Findings

[**unknown text redacted: 3 lines**] The expert's testimony "was to the effect that there was nothing that was stored in the attic that had burned."

[**Linhardt's**] second question to the expert was ambiguous and his response was subject to the interpretation that there were no personal belongings in the attic. Also, like the misstatements to the jury, the representation did not involve a material fact because the issue on appeal was whether there was sufficient evidence to prove that Thomas had committed perjury when he testified before the grand jury that documents in the bedroom were "burnt."

C. Sentencing Judge

1. Background

Thomas' presentence report stated that he told the probation officer that he earned $1,114 plus a $1,000 housing subsidy, each month from Thomas Sanders and Associates.

[**Linhardt**] wrote a letter to the judge [**who presided in James Sanders' trial. He**] enclosed a copy of Thomas' presentence report, and claimed that it indicated that James was Thomas' sole source of income. He reminded the judge that [**Thomas Sanders was convicted of perjury for stating that the fire that James Sanders claimed had destroyed a lot of Shippers Dispatch documents had really happened.**].

The defense attorney sent a response to the judge pointing out that the report indicated that Thomas received his income from Thomas M. Sanders and Associates, [**not James H. Sanders and Associates**].

Copies of both letters are attached at Tab B.

2. Findings

[**unknown text redacted: 4 lines**] it was a mistake and [**he**] did not [**unknown text redacted**] received a copy of the defense attorney's letter to the judge [**unknown text redacted: 2 lines**].

We concluded that [**Linhardt's**] letter to the judge was a mistake rather than an intentional act to deceive the court. The presentence report which [**he**] enclosed with the letter clearly contradicted the assertion in [**his**] letter. In addition, if [**he**] had intended to deceive the Court, it is unlikely that [**he**] would have sent a copy of the letter to the defense counsel.

D. Witness Vouching

1. Background

Thomas claimed that [**Linhardt**] engaged in witness vouching during summation. Specifically, he asserted that it was improper of [**Linhardt**] to tell the jurors that two witnesses had lied on the stand, the defendant and his girlfriend, or the two experts, and then ask them to consider who had a motive to lie. According to Thomas, [**Linhardt's**] comments were similar to ones which the Ninth Circuit Court of Appeals found to be grounds for reversal in *United States v. Kerr*, 981 F.2d 1050 (9th Cir. 1992).

In Kerr, the court defined witness vouching as placing the prestige of the government behind the witness by providing personal assurances of the witness' veracity. *Id.* at 1053. In that case, the prosecutor asked the jury whether several government witnesses could have "hoodwinked" him, the agent, and the court. He also stated his personal opinion about the veracity of several of the witnesses. *Id.* at 1052-53.

2. Findings

[**Linhardt stated (probably in the course of the OPR investigation)**] that [**his**] comments were not inappropriate and we concur. [**He**] noted inconsistencies in the testimony and

asked the jury who had a motive to lie. Unlike the prosecutor in Kerr, [**Linhardt**] did not provide personal assurances of veracity.

E. Attempt to Inflame the Jury

1. Background

Thomas' final allegation is that [**Linhardt**] expressed [**his**] personal opinion during the rebuttal at his trial in an attempt to inflame [**unknown text redacted: 2 lines**]. The defense counsel began his closing argument by stating that:

What you've just seen in the last couple of minutes should tell you something about the extent to which the Government is willing to go to get somebody. The person they really want here [**James Sanders**] isn't sitting here - [**he's sitting back there, and they want him**] bad enough that they will do anything, anything that would in any way stand in their way of getting that [**man back there, James Sanders**]. And you just saw the emotion with which the Government feels they want to get [**Jim Sanders**].

He also argued that the government was pursuing a "personal vendetta."

During rebuttal, [**Linhardt**] argued that:

Mr. Jackson, the defense attorney, talks about the legal system, and that's why I get upset. He said I was upset, and that's right, because the legal system is predicated upon everybody telling the truth. If it doesn't happen, people who commit crimes can escape and people who do not commit crimes can be falsely accused. The basis of the legal system is telling the whole truth. That's when you take an oath, you are sworn to do that and, yeah, I get plenty upset when I think that didn't happen, because that's the crux of the system.

2. Findings

In *United States v. Koon*, 34 F.3d 141 (9th Cir. 1994), the Ninth Circuit stated that in analyzing the effect of a comment upon a jury, the court should not assume that a prosecutor intended an ambiguous remark to have its most damaging meaning or that the jury will draw that meaning rather than a less damaging one.

[**Linhardt's**] remarks arguably were susceptible to the interpretation that the entire legal system was at risk if the jury failed to convict Thomas. However, they were equally, if not more, susceptible to the interpretation that [**he**] was refuting the defense's argument that [**he**] was prosecuting Thomas because he was an obstacle in his quest to [**prosecute James Sanders**].

In light of the defense counsel's remarks and the fact that [**Linhardt**] made the comments during rebuttal rather than initial closing argument [**unknown text redacted: 2 lines**] did not intend to inflame the jury. Moreover, the defense counsel's failure to object to the comments or raise them on appeal suggests that he, unlike his client, did not consider them improper.

III. Conclusion

We found that [**Linhardt**] mischaracterized the defendant's testimony during [**summation**] and after the trial when [**he**] advocated that Thomas should receive a sentencing enhancement for obstruction of justice based on his testimony. We also found that [**he**] made a misstatement in a letter to the judge [**who sentenced your brother, James H. Sanders**]. However, we concluded that these actions were careless mistakes rather than professional misconduct or poor judgment. We found that the remaining allegations were unsubstantiated.

[**Signature element redacted**]

APPENDIX G

Department of Justice

Office of Professional Responsibility

Washington, D.C. 20530

FEB 25 1999

Paul Seave
United States Attorney
Eastern District of California
555 Capitol Mall, Suite 1550
Sacramento, California 95814

Dear Mr. Seave:

This Office has completed its inquiry into allegations that Thomas M. Sanders [**unknown text redacted**] made against [**AUSA Daniel S. Linhardt**] in [**unknown text redacted**] complaints to the Department. We enclosed [**unknown text redacted**] copies of complaints in our March 25, 1998 letter to you.

We found that [**Linhardt**] mischaracterized Thomas Sanders' testimony during summation and after the trial when [**Linhardt**] advocated that Thomas Sanders should receive a sentencing enhancement for obstruction of justice based on his testimony. We also found that [**Linhardt**] made a misstatement in a letter to the judge [**who sentenced Sanders' brother, James H. Sanders**].

However, we concluded that these actions were careless mistakes rather than professional misconduct or poor judgment. We found that remaining allegations were unsubstantiated. Director Donna A. Bucella, Executive Office for United States Attorneys, has been provided with a report which more fully discusses our inquiry and findings.

Enclosed are copies of our letters to the complainants informing them of our findings.

[Signature element redacted]

APPENDIX H

Department of Justice

Office of Professional Responsibility

Washington, D.C. 20530

FEB 25 1999

Thomas M. Sanders
10650 Southwest Plaza Court
Space 50/Box J-45
Houston, Texas 77074

Dear Mr. Sanders:

In your February 18, 1998 letter to this Office, you alleged that Assistant United States Attorney Daniel S. Linhardt engaged in professional misconduct while prosecuting you and your brother, James H. Sanders.

We initiated an inquiry into your allegations. We found that Mr. Linhardt misstated your testimony during summation and after your trial when he advocated that you should receive a sentencing enhancement for obstruction of justice based on your testimony. We also found that he made a misstatement in a letter to the judge who sentenced your brother, James H. Sanders. However, we determined that these actions were mistakes rather than intentional conduct and thus concluded that he did not engage in professional misconduct. We found that your remaining allegations were unsubstantiated.

Thank you for bringing this matter to our attention.

Sincerely,
H. Marshall Jarrett
Counsel

By: **s/Melanie Russell**
Melanie Russell
Assistant Counsel

APPENDIX I

Win at all costs - Government Misconduct in the name of expedient justice. A ten-part series of stories in the Pittsburgh Post-Gazette, published November 22, 1998 through December 13, 1998, examining misconduct by federal law enforcement officials.

Part 7, December 6, 1998. When safeguards fail: Grand juries make questionable calls when prosecutors hide the evidence.

By Bill Moushey, Post-Gazette Staff Writer

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Perjury unpunished

Witnesses who lie before grand juries on behalf of the government are seldom punished.

Indeed, federal prosecutors often threaten grand jury witnesses whose testimony doesn't conform with the government's version of events.

Thomas Sanders is a retired Air Force pilot who logged almost 1,000 hours of combat flying during the Vietnam War. After he left the service, he lived in a house owned by his brother.

The house burned in an accidental fire in July 1993.

In September 1994, Sanders' brother, Jim, was indicted for mail fraud. He told prosecutors some of the records of his company had been destroyed in the 1993 fire.

Prosecutors didn't believe him and had Thomas Sanders testify before a grand jury.

Here are the key points of that testimony: There were records other than his own in the house, but he wasn't sure if

they were his brother's. Some of the records were "not recognizable, burnt." And there might have been more records in the attic, which he presumed would have been destroyed in the fire.

A fire official testified that no records were destroyed.

Based on that contradiction, Thomas Sanders was charged with perjury.

In the trial's closing argument, Assistant U.S. Attorney Daniel S. Linhardt of Sacramento, Calif., several times misstated Sanders' grand jury testimony, insisting Sanders had said that "everything in the attic burned."

Despite the protests of his attorney over the misstatements, a jury found Sanders guilty. During the sentencing hearing, Linhardt admitted he'd been "mistaken" about what Sanders had said — that Sanders never testified before a grand jury about anything in the attic burning.

The prosecutor wasn't punished for his misstatement.

Sanders was sentenced to six to 24 months in prison.

His appeal has been denied and he is living and working in Houston, waiting for an order to report to prison.

In a complaint to the U.S. Justice Department's Office of Professional Responsibility, Sanders charged that Linhardt engaged in misconduct from the moment he came out of the grand jury room.

"[Linhardt] stepped out into the hall and advised my attorney that he was going to have me indicted if I didn't go back into the room and 'change my story.' I didn't know enough about the situation to know what he wanted me to say," he told the OPR.

He hasn't heard if his complaint is being investigated.